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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1967

No. 755

FIRST AGRICULTURAL NATIONAL BANK OF
BERKSHIRE COUNTY,

Appellant,

v.

STATE TAX COMMISSION,

Appellee.

on appeal from the Supreme Judicial Court for the
Commonwealth of Massachusetts.

MOTION FOR LEAVE TO FILE BRIEF
AND BRIEF OF
COLORADO BANKERS ASSOCIATION
AS *AMICUS CURIAE*
IN SUPPORT OF APPELLANT'S
JURISDICTIONAL STATEMENT

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December, 1967

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JURISDICTIONAL STATEMENT

The Colorado Bankers Association respectfully moves for leave to file the accompanying brief *amicus curiae* in support of appellant's jurisdictional statement. The consent of appellant has been obtained; consent of the appellee has been refused. Notwithstanding the lack of appellee's consent, applicant submits that it represents interests of its members and others who are or probably will be faced with local tax law changes on the strength of the holding of the Massachusetts Supreme Judicial Court in the case at bar, all of which bespeak applicant's participation herein.

Applicant is an unincorporated trade association which includes in its membership two hundred fourteen of the two hundred sixteen commercial banks in Colorado. One hundred sixteen of these banks have national charters and ninety-seven have state charters. Within the City and County of Denver all commercial banks, fifteen national and ten state, are members of applicant.

During the months of November and December, 1967, the City and County of Denver took the following actions affecting the liability of national banks in Denver for city sales and use taxes:¹

- a. On November 21, 1967, the Manager of Revenue, City and County of Denver, issued an order, to become effective January 1, 1968, repealing all prior bulletins, letters, instructions, rules and regulations exempting national banks from the incidence of the city sales and use tax. (National banks had been exempt from these taxes from their inception under such rules and regulations.)
- b. The Denver City Council enacted ordinances, introduced on November 20, 1967, and effective December 2, 1967, which repealed exemptions in the city sales and use tax ordinances pertaining to sales and uses which Denver would be prohibited from taxing under the Constitution or laws of the United States or the State of Colorado. The announced intention of these repealing ordinances was to support the order of the Manager of Revenue cited above.

Upon information and belief, applicant avers that these actions by the Manager of Revenue and the City Council of Denver, were undertaken upon the strength of the hold-

¹Also affected are state banks and other financial institutions, but inasmuch as they are not subject to the case at bar, attention will be focused exclusively upon the effects on national banks. The Denver Lodger's Tax was also the subject of simultaneous changes, but again national banks are not affected by this tax and further mention will be omitted herein.

ing of the Massachusetts Supreme Judicial Court in the case at bar. Thus, said holding has substantially affected the interests of applicant's national bank members within the City and County of Denver. The actions detailed above will, as of January 1, 1968, cause national banks located in the City and County of Denver for the first time to become liable for payment of city sales and use tax on the purchases and use of all tangible personal property thereafter acquired by such banks. This raises the precise issue presented in the instant case, to-wit: May a state or political subdivision impose and collect sales and use taxes on purchases by national banks, or are such taxes invalid as being repugnant to the Constitution and laws of the United States?

Applicant is aware that this motion is filed several weeks after the filing by appellant of its jurisdictional statement on October 23, 1967. Applicant submits that this delay was unavoidable and this motion could not have been filed prior to or simultaneously with appellant's jurisdictional statement because the actions detailed above by the City and County of Denver giving rise to applicant's interest in this case did not occur until late November and early December, 1967.

Applicant asserts that these facts and the questions of law arising therefrom have not been and cannot adequately be presented by the parties because of their remoteness from the locus of these events and the current nature of the developments recited above. Applicant further submits that the facts and issues arising out of events in the City and County of Denver, Colorado, relating to the imposition of sales and use taxes on national banks, parallel the facts and issues set forth in the jurisdictional statement of appellant to a sufficient degree that they buttress the substantiality and importance of the questions raised by the decision of the Massachusetts Supreme Judicial Court.

Accordingly, the Court is urged to accept the brief of

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applicant *amicus curiae* in support of appellant's jurisdictional statement, and to give plenary consideration to the matter upon the merits.

Respectfully submitted,

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Of Counsel:

Bruce T. Buell

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BRIEF OF COLORADO BANKERS ASSOCIATION
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JURISDICTIONAL STATEMENT

The interest of the Colorado Bankers Association in this case is set forth in its motion to which this brief is annexed.

OPINION BELOW AND JURISDICTION

Amicus adopts the text set forth in appellant's jurisdictional statement regarding the opinion below and jurisdiction of this Court.

STATUTES INVOLVED

Amicus adopts the text set forth in appellant's jurisdictional statement regarding the statutes involved. In addi-

tion, for the purposes of this brief, *amicus* asserts that the following ordinances of the City and County of Denver are involved: Ord. 437, Series of 1964 (Article 166, Revised Municipal Code of the City and County of Denver—Sales Tax) (App. 10), Ord. 438, Series of 1964 (Article 166A, Revised Municipal Code of the City and County of Denver—Use Tax) (App. 12), Ord. 412 and 413, Series of 1967 (App. 14). The regulations and orders of the Manager of Revenue involved are Section 0, Guide V, Denver Sales, Use and Lodger Tax Auditors Guide (1966) (App. 15) and Order dated November 21, 1967 (App. 16).

QUESTIONS PRESENTED

Amicus adopts the questions set forth in appellant's jurisdictional statement. In addition, for the purposes of this brief, the question presented is whether the City and County of Denver may impose and collect sales and use taxes on purchases by national banks located in Denver when the legal incidence of these taxes falls on such banks as purchasers.

STATEMENT OF THE CASE

Amicus adopts the statement of the case set forth in appellant's jurisdictional statement. In addition, *amicus* asserts that its national bank members in the City and County of Denver face the burden of city sales and use taxes commencing January 1, 1968, by virtue of recent actions taken by the Denver City Council and Manager of Revenue on the strength of the holding in the case at bar.

1. *Material Facts.* From the inception of the Denver Sales Tax in 1948 and the Denver Use Tax in 1962, national banks located in Denver have been exempt from the incidence of these city taxes. This exemption has rested on regulations of the Manager of Revenue, the most recent form of which is set forth at page 15 of the appendix. On

November 21, 1967, the Manager of Revenue ordered that this exemption be repealed. (App. 16).

Simultaneously with the Manager of Revenue's order, the City Council repealed exemptions appearing as subsections 166.11-3 and 166A.3-3(16) of the Revised Municipal Code. These exemptions pertained to sales and uses which Denver would be prohibited from taxing under the Constitution or laws of the United States or the State of Colorado. The exemptions appear at pages 11 and 13 of the Appendix and the repealing ordinances are set forth at page 14.

2. *Proceedings.* No proceedings have as yet been instituted by or against the City and County of Denver regarding these taxes because January 1, 1968, is the effective date of the Manager of Revenue's order. Nevertheless, he has announced his intention to enforce his order on said date and *amicus* is advised that litigation will be initiated by national banks located in Denver.

ARGUMENT

The Questions are Substantial and Important

A. *Amicus* adopts the argument of appellant in its jurisdictional statement regarding the substantiality and importance of the questions presented.

B. *A Decision by this Court Will Clarify the Authority of the City and County of Denver and other Local and State Taxing Entities to Levy Sales and Use Taxes on National Banks and Will Eliminate Additional Litigation.*

The facts which *amicus* seeks to bring to the attention of this Court underscore the importance of this Court giving plenary consideration to the questions presented by the case at bar.

The City and County of Denver is but one of a myriad of local and state entities imposing sales and use taxes. Denver, like the State of Colorado, has traditionally exempted national banks from the incidence of these taxes.² This exemption has been grounded upon the Federal Constitution and statutes as construed by this Court in a long line of cases including one directly involving Colorado. *Colorado National Bank of Denver v. Bedford*, 310 U.S. 41.

The case at bar has cast doubt on the authority of the decisions of this Court and has provided authority upon which the City and County of Denver has felt justified to act in repealing the exemption for national banks. This will provoke litigation paralleling that in Massachusetts which will be laid to rest only with a determinative resolution of the questions presented herein.

While the interests of only fifteen national banks are directly affected by the Denver case, *amicus* supports the contention of appellant that national banks in many other local and state jurisdictions face legislative, regulatory or judicial determinations affecting their liability for sales and use taxes. Thus, plenary consideration by this Court of the case at bar will have merit in lending definite guidance to such determinations and eliminating litigation arising therefrom.

CONCLUSION

For the aforementioned reasons it is respectfully submitted that the questions presented in the case at bar are

²Colorado declares national banks to be exempt from state sales and use taxes because of the banks' status as federal instrumentalities. Rule No. 41, Colorado Director of Revenue.

so substantial and of such importance as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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APPENDIX

Ordinance No. 437, Series of 1964

**Article 166, Revised Municipal
Code of the City and County of Denver**

Article 166 — Sales Tax

* * *

166.10. *Taxable Items.* On and after January 1, 1948; there is hereby levied and there shall be collected and paid a tax in the amount stated in Section 166.13 hereof [2%] as follows:

—1. On the purchase price paid or charged upon all sales and purchases of tangible personal property at retail.

* * *

—6. Upon the furnishing, for any consideration, of tangible personal property together with the services of an operator thereof, for another person....

* * *

166.11. *Items Exempt from Taxation.* There shall be exempt from taxation under the provisions of this article the following:

—1. All sales to the United States government, to the State of Colorado, its departments and institutions, and the political subdivisions thereof in their government capacities only.

—2. All sales made to religious, charitable and eleemosynary corporations, in the conduct of their regular religious, charitable or eleemosynary functions.

—3. All sales which the city is prohibited from taxing under the Constitution or laws of the United States or the State of Colorado.

* * *

166.13-2. Retailers shall add the tax imposed hereby, or the average equivalent thereof, to the sale price or charge, showing such tax as a separate and distinct item, and when added such tax shall constitute a part of such price or charge and shall be a debt from the consumer or user to the retailer until paid and shall be recoverable at law in the same manner as other debts. (Ord. 395, Series of 1967).

* * *

166.15. *Unlawful to Assume or Absorb Tax.* It shall be unlawful for any retailer to advertise or hold out or state to the public or to any customer, directly or indirectly, that the tax or any part thereof imposed by this article will be assumed or absorbed by the retailer, or that it will not be added to the selling price of the property sold, or, if added, that it or any part thereof will be refunded. Any person violating any provision of this article shall be subject to the penalties herein provided.

Ordinance No. 438, Series of 1964

Article 166A, Revised

**Municipal Code of the
City and County of Denver**

Article 166A — Use Tax

* * *

166A.3-1. *Legislative Intent*

—1(1) It is hereby declared to be the legislative intent of the Board of Councilmen that for the purposes of this article, every person who stores, uses, distributes or consumes in Denver any article of tangible personal property purchased at retail, as herein defined, is exercising a taxable privilege.

* * *

166A.3-2. *Imposition of Tax*

—2(1) On and after . . . April 30, 1962, there is hereby levied and there shall be collected and paid, a tax by every person exercising the taxable privilege defined in Sec. 166A.3-1(1) hereof, for the privilege of storing, using, distributing or consuming in Denver any article of tangible personal property as herein defined, purchased or acquired at retail.

—2(2) The amount of the tax hereby levied is two percent of the purchase price . . .

* * *

166A.3-3. *Exemptions*. The use, storage, distribution or consumption in Denver of the following tangible personal

property is hereby specifically exempted from the tax imposed by Sec. 166A.3-2:

* * *

-3.3(10) All sales to the United States Government; to the State of Colorado, its departments or institutions, and the political subdivisions thereof, in their governmental capacities only; and all sales to the City and any department thereof.

-3.3(11) All sales to religious, charitable and eleemosynary corporations, in the conduct of their regular religious, charitable and eleemosynary functions and activities.

* * *

-3.3(16) All sales, uses and other transactions which Denver is prohibited from taxing under the Constitution and laws of the United States of America or under the Constitution of the State of Colorado.

Ordinance No. 412, Series of 1967

**BE IT ENACTED BY THE COUNCIL OF THE CITY
AND COUNTY OF DENVER:**

Section 1. That Subsection 166.11-3 of the City Sales Tax Article of the Revised Municipal Code, be and the same is hereby repealed.

Section 2. The Council finds this Ordinance is necessary for the immediate preservation of the public health and public safety, and determines that it shall take effect immediately upon its final passage and publication.

Ordinance No. 413, Series of 1967

**BE IT ENACTED BY THE COUNCIL OF THE CITY
AND COUNTY OF DENVER:**

Section 1. That Subsection 166A.3-3(16) of the City Use Tax Article of the Revised Municipal Code, be and the same is hereby repealed.

Section 2. The Council finds this Ordinance is necessary for the immediate preservation of the public health and public safety, and determines that it shall take effect immediately upon its final passage and publication.

Regulation of Manager of Revenue

Denver Sales, Use and Lodger Tax

Auditors Guide (1966)

Guide V — Exemptions

o. Banks. Sales to National Banks, State Banks and Federal Land Banks are exempt when purchases are used in their banking business. Banking business is defined as being the normal operation of savings and commercial bank departments. A bank which operates any other business in addition to its banking facilities would not enjoy the immunity from taxation on purchases consumed in the maintenance and operation of that part of the business which is not necessary to the proper function of the bank. The purchase of computers, business machines, etc., which are used in the keeping of customer's records which are not ordinary banking transactions will be deemed to be purchased for non-banking business and as such are subject to the tax. Banks are required to collect and remit sales tax on all sales of personalized checks and upon the sale of repossessed property or other property sold by the bank. (166.11-3, 166A.3-3(16) . . .).

Order of Manager of Revenue

I, Charles L. Temple, Manager of Revenue of the City and County of Denver, State of Colorado, pursuant to Section 166.60 of the City Retail Sales Tax Article, pursuant to Section 166A.11 of the City Use Tax Article, pursuant to Section 166B.13 of the City Lodger's Tax Article, and pursuant to Article 123, all of the Revised Municipal Code of the City and County of Denver, State of Colorado, hereby repeal, effective on and after 11:59 P.M. on December 31, 1967, any and all bulletins, letters and instructions heretofore issued by the Manager of Revenue under the authority of said City Retail Sales Tax, City Use Tax and City Lodger's Tax Articles of the Revised Municipal Code of the City and County of Denver, State of Colorado, exempting national and state banks, industrial banks, Morris Plan companies, trust companies or finance companies from the incidence of the several taxes levied and assessed under said Articles 166, 166A and 166B of the Revised Municipal Code of the City and County of Denver, State of Colorado, and especially the exemptions to National and State Banks set forth in subsection (p) of Section 7 of the Exemptions set forth in the Rules and Regulations to the Denver Retail Sales Tax issued by the Manager of Revenue under date of January 1, 1952, and also the exemptions to National Banks and State Banks set forth in subsection "o" of Section "V" of the exemptions set forth in the current edition of the Auditor's Guide presently in force and effect; and by virtue of the foregoing do repeal, cancel and annul, effective on and after 11:59 P.M. on December 31, 1967, all exemptions heretofore, at any time, and in any form, granted to said National and State Banks, Industrial Banks, Morris Plan companies, trust or finance companies, from the incidence of the several taxes levied

and assessed under said Articles 166, 166A and 166B of
the Revised Municipal Code of the City and County of
Denver, State of Colorado.

Issued at Denver, Colorado, this 21st day of November,
1967.

/S/ CHARLES L. TEMPLE
Charles L. Temple
Manager of Revenue
City and County of Denver

APPROVED FOR LEGALITY:

/S/ MAX P. ZALL
Max P. Zall
City Attorney
City and County of Denver